IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL, CIVIL JURISDICTION

APPEAL NO.1081 OF 2005
IN
NOTICE OF MOTION NO.1915 OF 2005
IN
SUIT NO.1796 OF 2005
WITH
CROSS OBJECTION (LODG.) NO.2 OF 2005
WITH
CROSS OBJECTION (LODG.) NO.14 OF 2005

WITH

CROSS OBJECTION (LODG.) NO.15 OF 2005

M/s.Chheda Housing Development )
Corporation, a Partnership firm )
registed under the provisions )
ofIndian Partnership Act )
1932,havig their office a 109- )
111, Goyal Shopping Arcade S.V. )
Road,Borivali (West), Mumbai- )
400 092. )..APPELLANT

Versus

1.Bibijan Shaikh Farid )
2.Fazal Shaikh Farid )
3.Afzal Shaikh Farid )
4.Auragzeb Shaikh Farid )
5.Alizer Shaikh Farid )
6.Aroz Shaikh Farid )
7.Firoz Shaikh Farid )
8.Noorie Shaikh Farid )

9.Naseeb Shaikh Farid )
All of Mumbai, Indian )
Inhabitants, having their )
address at 93, Amrut Nagar, )
502/503, Nirman Apartment, )
M.V.Road, Kurla Andheri )
Road, Andheri (East), )
Mumbai-400 069. )
10.Mohammed Hussein Merchant )
Mumbai, Indian Inhabitant )
carrying on business at 210/ )
211, Gundecha Chamber, 2nd )
Floor, Nagindas Master Road )
Fort, Mumbai-400 023. )
11.Star Habitat Pvt. Ltd., a )
Company registered under the )
Provisions of the Companies )
Act, 1956 having office at )
210/ 211, Gundecha Chamber,2nd)
Floor, Nagindas Master Road )
Fort, Mumbai-400 023. )
12.Akshay Doshi of Mumbai )
Indian Inhabiant, having his )
address at Bhoomi Hills, Near )
Suncity, Thakur Village, )
Kandivali(East),Mumbai-400 101)
13.Ajay Mehta, of Mumbai, Indian)
Inhabitant,having )
address at Bhoomi Hills, Near )

Suncity, Thakur Village, )

Kandivali(East),Mumbai-400 101)..RESPONDENTS

Dr. Virendra V. Tulzapurkar, Senior Counsel with Mr. Virag Tulzapurkar, Mr. P.N. Modi, Mr. Pramodkumar and Mr. A.H. Khatri, i/b. Pravin Mehta & Mithi & Co., and M/s.Pramodkumar & Co., for Appellants.

Mr. Rohit Kapadia, Senior Counsel with Mr. N.G. Thakkar, Senior Counsel i/b. Vinod Mistry & Co., for Respondent No.10.

Mr. Arif Y. Bookwala, Senior Counsel with mr. A.H. Gokhale i/b.Ranjit & Co., for Respondent No.11.

Mr. Janak Dwarkadas, Senior Counsel with Mr. T.N. Subramanian,, Senior Counsel i/b. Wadia Ghandi & Co., for the Respondent No.12 and 13.

Mr.K.N. Gaikwad, for Respondent No.14.

Ms. Trisha Pangarkar i/b. Yusuf & Abraham for Respondent Nos. 1 to 9.

CORAM: **F.I. REBELLO &**

**MRS.V.K.TAHILRAMANI, JJ.**

DATE: 15th February, 2007

JUDGMENT (PER F.I. REBELLO, J.)

. This an Appeal by the Plaintiff. Along with the Appeal respondent Nos. 1 to 9 and Respondent Nos.10 and 11 have also filed cross objections. All of them are being heard and finally disposed of by this judgment.

2. The Appeal is preferred by the Appellant who is the original plaintiff. The respondent Nos. 1 to 9 are the original defendant Nos. 1 to 9, Respondent No.10 is the original defendant No.10, respondent No.11 is the original defendant No.11 and respondent Nos. 12 and 13 are the original defendant Nos. 12 and 13. The respondent Nos. 1 to 9 are the legal heirs of one late Shaikh Farid Shaikh Kalander, who had filed a suit in respect of the suit property and other properties against Behramjee Jeejeebhoy Pvt. Ltd.. being Suit No.2105 of 1989, claiming adverse possession against Behramjee Jeejeebhoy Pvt. Ltd. Consent terms came to be filed on 22nd June, 1992 under which a declaration was granted declaring late Shri Shaikh Farid Shaikh Kalandar to be the owner of the property. The consent decree came to be registered on 24th August, 2000. It is the case of the Appellants that on 20th April, 2004 there was a Memorandum of Joint development entered into between 10th respondent and the appellants for joint development of the property which was identified as a

specific part of Plot C-2 in terms of the lay out scheme/Sub Division sanctioned under reference No.C/Office-7A/Sub Division/SR/3496 dated 15th October, 2002. A certificate had been issued by the Advocates and Solicitors for respondent No.10 that the title in the said property was in late Shaikh Farid Shaikh Kalandar and respondent No.10. Respondent NO.10 in respect of the cause of action against respondent Nos. 1 to 9 filed a suit being Suit No.2180 of 2004, for various reliefs amongst others for an injunction against respondent Nos. 1 to 9 from causing any obstruction or hindrance or interfering with the right of the respondent No.10 from exercising the power under the Power of Attorney. The plaint was amended by adding respondent No.11 as defendant. The suit came to be decreed on 10th March, 2005. The Appellants contend that another certificate was issued on 23rd March, 2005 by the Advocate for Respondent No.10, certifying that the certificate of title dated 16th March, 2004 issued by the Advocates was still good and the said property was free from all encumbrances and reasonable doubts.

. At this stage it may be pointed out from the pleadings that the case of Respondent Nos.10 and 11 is that there was an agreement entered into between the respondent Nos. 10 and 11 on 22nd January, 2004 whereby the respondent NO.11 was entrusted the right

to develop the larger property. It may also be added that in respect of the sub division plots identified as sub plot No.A1, B and C1 were to be developed by one M/s.R.N.A. Builders. An agreement came to be entered into on 24th March, 2005 between the respondent Nos. 1 to 9 and 10th respondent on the one hand and the appellants on the other whereby development rights were granted to the Appellants in respect of 2,00,000 sq.ft. of plot C-2. One of the Clauses in the Agreement was that the area admeasuring 2.00 lakh sq.ft. to be built was by utilising the FSI of 1.00 i.e. 1.00 lakh sq.ft. and by respondent Nos. 1 to 10 making available TDR to the extent of balance 1.00 lakh sq.ft. which would be available and/or generated from the larger portion of the property or by acquiring slum TDR from the market if required. Pursuant to this agreement the joint development agreement of 28th April, 2004 was returned back as cancelled. On the same day respondent Nos. 1 to 10 issued letter of confirmation that it authorised respondent No.10 to initiate and execute development agreement of 2.00 lakh sq.ft.on Plot C-2. The Appellants paid to respondent Nos. 1 to 11 a sum of Rs.2,60,00,000/-, the receipt whereof is acknowledged by respondent Nos. 1 to 10. Further part consideration of Rs.40.00 lakhs was to be paid within 15 days from the owners obtaining Plinth Commencement Certificate. The balance amount was to be paid in 5 equal

quarterly instalments and the last instalment was to be Rs.1.35 crore. A sum of Rs.5.00 lakhs was to be paid on completion of transaction and on execution of vesting documents including Conveyance in favour of the Society/Societies, Organisations as may be formed and registered by the Developers of premises in the building/s to be constructed by the Developers under the Agreement. The possession was given to the appellant by letter dated 24th March, 2005 and recorded. A supplemental agreement was entered into on 25th March, 2005 whereby the price was increased to Rs.3.35 crores.

. Pursuant to a public notice on 14th May, 2005 a claim was filed by the 11th respondent. The Respondent No.11 is a company incorporated under the Indian Companies Act and whose Directors are the members of the family of respondent No.10. Pursuant to this, correspondence was exchanged on one hand between the Appellants and Respondent No.1 to 10. As Respondent Nos.11, 12 and 13 were developing on an area which was to be provided as access to Plot No.C-1, a notice was also given to them. A suit came to be filed in which Notice of Motion was taken out, being Notice of Motion No.1915 of 2005 for ad-interim relief. The impugned order came to be passed on 1st September, 2005.

3. The defence of Respondent Nos.10 is that

there were two immovable properties belonging to respondent Nos. 1 to 10, one at Goregaon and the other the suit property at Kandivali. Respondent No.10 approached the appellants for financial assistance for development the property at Goregaon to the tune of Rs.5.00 crores. Accordingly, two allotment letters dated 24th March, 2004 and 20th April, 2004 were issued to secure part payment of Rs.2.50 crores which had to be made by the appellants. It was the understanding that payment was to be made against these two allotment letters. The Appellants, however,desired that there should be a proper security as they are investing a considerable sum and the appellants sought security of 8.00 lakhs sq.ft. of FSI of suit property and that is how the joint development agreement in respect of Kandivali property was executed, as the Appellants apprehended that on account of several tenants and occupants in Goregaon property, the development proposal may not be feasible and in those circumstances the property would not constitute an adequate security. It is in these circumstances a security was given of 8.00 lakhs which was subsequently was reduced, as the appellants failed to bring in further sum of Rs.2.50 crores. The security was reduced to 2.00 lakh sq.ft. In the alternative it was submitted that the Agreement was adjudicated and stamped as a Development Agreement and the law is settled that Development Agreement cannot be

specifically enforced. The respondent No.11 have adopted the stand of the respondent No.10. It was pleaded that there is suppression of material facts and that the suit as filed is not maintainable. The Appellants were aware of the Agreement entered into between the respondent Nos. 10 and 11 on 22nd January, 2004 and it is not open to the Appellants to contend that it was only noticed during the search of the proceedings of the City Civil Court. The Agreement between respondent Nos.10 and Respondent No.11 are prior agreements and must take precedence to the Agreement between the appellants and respondent Nos. 1 to 10. Respondent No.11 made payment to respondent No.10 as per Agreement dated 22nd February, 2004 and development work was in progress. The stand of respondent Nos. 12 to 13 is that the appellants have an alternative access in terms of the development plan of the property and as such the relief as prayed for could not be granted. Respondent Nos.1 to 9 adopted the stand of respondent No.10.

4. The learned Single Judge held, relying on the Agreement that the area agreed to be sold was part of Plot C-2. based on the sanctioned lay out. The learned single Judge also held that at the prima facie stage it was not possible to hold whether the Agreement is a Development Agreement. The learned single Judge held that the Agreement would have to be

read as a whole and material will have to be considered which could only be done at the trial of the suit. The contention urged that in view of Section 14 of the Specific Relief Act, the Agreement could not be enforced was rejected by the learned Judge by holding that the issue can only be decided at the final hearing of the suit. The various other contentions urged in support of the contention that the Agreement was a development agreement were rejected on the ground that the document would have to be construed by considering the other material on record and the evidence. After so holding and on considering the documentary evidence, the learned single Judge held that he was satisfied that a prima facie case has been made out. The learned Judge thereafter was pleased to make the Motion absolute in the following terms:-

> "Defendants, their servants, agents are restrained by an order and injunction from in any manner disposing of or alienating and encumbering an area admeasuring 2 lakh sq.ft. on Plot No.C-2 more particularly described in second schedule to the Agreement dated 24th March, 2005 as also utilising benefit of TDR/DRC generated by defendant Nos. 1 to 10 so as to adversely affect Plaintiff's right to construct and sell the said area in accordance with the agreement Exh.F-4 to the

Plaint."

After this order was pronounced certain additional submissions were made and the learned Judge thereafter was pleased to further order as under:-

> "46. In my view, once the injucntion/linterlocutory relief is to protect right of Plaintiffs under this agreement, plaintiff cannot get anything more than what is the entitlement under the agreement. Hence, the defendant Nos. 1 to 11, their servants, agents are restrained by an order and injunction from in any manner disposing of or alienating the area of 2 lakh sq.ft. to be used and utilised by construction of building as shown on plan annexed as Annexure "B" to the agreement, available as free sale on the property being part of property being C-2 shown shaded in the same plan and more particularly described in the Agreement so as not to adversely affect plaintiffs right under the same. The injunction granted in the foregoing paragraphs be read in this light and the clause in the Agreement reproduced above."

5. The Appellants are aggrieved by these observations in para.46 of the order, which according to them has resulted in denying them protections for

their right of development of additional 1,00,000 sq.ft. by way of TDR on the suit plot. They are also aggrieved by the non-grant of the injunction in respect of the suit way.

6. There was a delay in preferring the Appeal, which on a Motion taken out being Notice of Motion No.3537 of 2005 the delay was condoned. It is only after this, did the respondent Nos. 1 to 9 and 10 and 11 file their cross objections.

7. On behalf of the Appellants the issues raised and submissions made are as under:-

(a) After having held, that the Plaintiffs have made out a prima facie case and having made the notice of Motion absolute in terms as mentioned in para.42 of the judgment, could the learned Judge clarify the order by adding a rider at the end of para.46 of the judgment which reads as under:-

"The injunction granted in the foregoing paragraphs be read in this light and the clause in the Agreement reproduced above" which rider has the effect of nullifying the protection to the appellants and thereby permitting the respondents to deal with the TDR to the extent which could be made

available by the respondents to the appellants by acquiring or purchasing slum TDR from the open market free from all encumbrances, claims and dues.

(b) Whether inspite of the specific provision in the agreement granting to the appellants right of way through the Plot No.2A to Plot A-2 of the respondents property the relief in respect thereof should have been refused.

8. On the other hand on behalf of the respondent No.10 it is contended that the Agreement was an agreement for security and in the alternative is a development agreement and consequently the appellants are not entitled to specific performance of the agreement.

. On behalf of respondent No.11 it is submitted that the rights of the respondent No.11 were antecedent/prior to the rights of the appellants as the agreement entered into between the respondent No.11 and respondent No.10 was dated 22nd January, 2004 prior to the agreement between the appellants and respondent Nos. 1 to 10 which was on 20th April, 2004 and further that the agreement dated 22nd January, 2004 had been acted upon and that the agreement between the appellants and respondent Nos. 1 to 10 was an agreement for development and consequently could not be specifically enforced.

. On behalf of the respondent Nos. 1 to 9 the argument advanced on behalf of the respondent No.10 has been adopted.

9. On behalf of respondent No.12 and 13 it is contended that the issue relating to right of way was not seriously pressed or argued or placed for consideration before the learned single Judge. At any rate, it is submitted that the appellants are claiming right on plot C-2 which has an access in terms of the approved plan. In these circumstances the Appellants on the ground that there was an existing right of way can claim no right as pursuant to the approved lay out plan it is the plan as approved, which has make provided for access to the various sub divisions.

10. From the above submissions of the parties the principal contentions which have to be decided are:-

(1) Whether the appellants have made out a prima facie case that the agreement relied upon was an agreement for sale and not an agreement for security and/or alternatively an agreement for development which could not be specifically performed. If prima facie case is made out, for specific performance then whether the appellants are entitled to an injunction to restrain the respondents from alienating, transferring or using the TDR available from the suit

plot and the remaining plot pending the hearing and final disposal of the suit.

(2) Whether the appellants have made out a case for grant of injunction in what is described as the existing right of way, after a lay out plan has been approved on 15th October, 2002 and an access has been provided to Plot C-2 to the D.P. Road.

11. We shall first deal with the contention as to whether the appellants have made out a prima facie case. In this context prima facie, a finding will have to be first recorded, that there is an agreement which can be specifically performed. It is only on arriving at this conclusion, can it be said that the appellants have made out a prima facie case warranting grant of interim injunction subject to the other requirements of balance of convenience and irreparable loss and injury. The learned Single Judge on a consideration of the various documents including the agreement has come to the prima facie finding that the agreement is an agreement to sell, which can be specifically enforced. The respondents, therefore, will have to make out a case that the finding by the learned single Judge is perverse. The view taken by the learned trial Court, ordinarily will have to be upheld,if it was a view capable of being taken, irrespective of the Appellate Court arriving at a conclusion that another view is

probable which is a better view and as long as the findings based on which the view is taken are not perverse.

. Before we answer the issue, let us consider the judgments cited at the bar for the proposition as to which contract can be specifically enforced. Let us first deal with the judgment relied upon by the appellants. In the case of **Vallammal Rangarao Ramachar vs. Muthukumaraswamy Gounder & Anr. (1982) 3 SCC 508m,** the Supreme Court noted, that there were interpolations of material nature in the document and no explanation was offered on that count. The Appeal preferred by one of the appellants (Defendant No.2) was dismissed. The Court held that the motivated interpolation in a solemn document completely vitiates the document. In the other Appeal which was pending, the Court noted that the High Court after evaluating the evidence recorded a conclusion that the plaintiff was always ready and willing to perform his part of the agreement and consequently found no reason to differ from the view taken by the High Court.

. At this stage we may note the judgment, reliance on which placed by the Counsel for respondent No.11 namely **M/s.Bharat Barrel & Drum Mfg. Co. Ltd. vs. Hindustan Petroleum Corporation Ltd. & Ors., AIR 1998 Bom.170.** The issue before the

Division Bench of this Court was consideration of explanation to Section 16(c) of the Specific Relief Act. That explanation requires that the plaintiff must aver performance of or readiness and willingness to perform the contract according to its true construction. The learned Division Bench held, that the correct interpretation would be, if the plaintiff avers his readiness and willingness to perform the contract according to its true construction by the Court. The Court also noted that in an ordinary suit for specific performance where the parties are ad idem about the interpretation of the agreement it is not necessary that the plaintiff should adopt any particular set off words to indicate that he was and is ready and willing to perform the agreement. The Court on the facts of that case was considering not an ordinary suit for specific performance, but a case where parties were not at ad idem about the interpretation of an agreement. The ratio of the judgment therefore is that parties must aver readiness and willingness to perform the contract according to the interpretation the Court places upon it in a case where there is a dispute about its true interpretation. The ratio of that judgment will, therefore,, have to be applied in a a case where there is a dispute as to the true interpretation of a document for agreement to sell. The , parties must aver in such a case that they are ready and willing, to perform the contract as the Court interpreted by

the Court. In the instant case firstly we are at an interim stage. It is still open to the plaintiffs to amend the plaint if the circumstances so warrant. Secondly there is no dispute about the terms of the contract. The dispute is whether it is an agreement to sell or a security agreement or alternatively development agreement.

. In an unreported judgment in **Mrs. Pallavi R. Karani vs. M/s.Dadhawala Builders Pvt. Ltd. & Ors., in Appeal No.784 of 1991 in Notice of Motion No.2743 of 1990 in Suit No.3067 of 1990** a learned Division Bench after considering the earlier judgments of this Court, noted that the order of 7th March, 1988 in Appeal No.285 of 1988 in Notice of Motion No.76 of 1987 cannot be read as laying down the law that specific performance for development can never be granted or interim relief in such a suit should always be refused. In Notice of Motion No.763 of 1989 in Suit No.844 of 1989 M/s.Ghori & Khatri Builders (Regd) Vs. Iqbal Hussein Usman Fakir Mohamed Mansoori & ors., decided on February 8, 1991 a learned single Judge of this Court relying on the judgment in Appeal No.285 of 1988 in Notice of Motion No.76 of 1987 in Suit No.3419 of 1986 held on the facts there, that the agreement was a development agreement and accordingly refused to grant injunction. In the Appeal which was preferred, being Appeal No.218 of 1991 in Notice of Motion No.763 of

1989 in Suit No.844 of 1989, the Appellate Bench by order dated March, 9, 1993 held that the contention advanced was that it was a finance agreement. The learned Appellate Bench did not agree with the view of the learned single Judge and held that the Agreement would indicate that the respondents therein had created interest in the land and felt that the Agreement was clearly for development of the property and allowed the Appeal. Next reliance was placed in the case of **Volition Investment Pvt. Ltd. vs. Mrs. Madhuri Jitendra Mashroo and etc., AIR 2003 Bom.360.** On the facts there the Court held, that the Agreement to be an agreement of sale and not an agreement for development.

12. On the other hand on behalf of the respondents their learned Counsel relied on the unreported judgment in the case of **Asso Rihalani vs. Mr. Wilfred D'Souza & Ors., dated 18th January, 1988** and the order in **Notice of Motion No.76 of 1987 in Suit No.3419 of 1986** and the Appeal from the Appellate Bench and the judgment in the case of **Lokhandwala Estates & Development Company Ltd. & Anr. vs. Goregaon Siddharth Nagar Sahakari Griha Nirman Sanstha Ltd.** dated 27th September, 1996 and the judgment in **Gurudev Developers vs. Kurla Konkan Niwas Co-operative Housing Society 1999 (supp.) Bom. C.R. 257** and another judgment in **The Peerless General Finance & Investment Co. Ltd. vs. Swan**

**Mills Limited & Ors., 2000 (1) Bom. C.R. 48,** to contend that a development agreement cannot be enforced. All these judgments on the facts of those cases, have taken a view that a development agreement cannot be specifically enforced. Reliance is also placed in the case of **Union Construction Co. (Private Ltd.) vs. Chief Engineer, Eastern Command, Lucknow and Anr., AIER 1960 Allahabad 72.** In that case the issue was whether a building or engineering contract could be specifically performed considering Section 12(c) of the Specific Relief Act. The Court held that compensation in money would ba adequate remedy. In Dave **Ramshankar Jivatram vs. Bai Kailasgauri, AIR 1974 Guj 69,** what was in consideration was the explanation to Section 10. The High Court was dealing with a Second Appeal and not a matter arising from an interim relief. Section 10 provides that specific performance of a contract of immovable property should normally be granted as a rule. However, the explanation sets out that specific performance need not be granted if the contrary is proved, meaning thereby that compensation in money is adequate. In other words in a case of transfer of immovable property, the normal rule is that if there is a breach of contract to transfer the immovable property that cannot be adequately relieved by compensation in money unless the contrary is proved.

12. In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be :-

(a) An Agreement only entrusting construction work to a party for consideration;

(b) An Agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.

(c) A normal agreement for sale of an immovable property.

. An Agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An Agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced.

. We are however dealing with a case of the

second type. Courts for construing such a contract in this State will have to take into consideration, the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the Act, 1963 apart from the Specific Relief Act. Under that Act, a local Act, there is an obligation cast on the owners of the land to convey not only the constructed portion but also his interest in the land beneath the construction. Under the Act an owner of the land who causes the construction to be put up becomes the promoter. Such construction can be put up by a developer or builder, who in turn sells the constructed portions to various persons by entering into Agreements. These provisions, in our opinion would be relevant in determining the true character of the document. Can such a contract be specifically enforced. Let us, therefore, consider some of the arguments advanced by the respondents to contend that the agreement is a development agreement. Reliance was placed by the 10th Respondent on clause 6 of the Agreement to contend that no specific performance can be claimed and that payment of interest is sufficient remedy. In our opinion, such a contention is misplaced. The Clause, correctly construed prima facie would be a clause for liquidated damages in addition to specific performance. The other contention is that, considering the agreement was stamped and stamp duty paid as a Development

Agreement and it must be so held. In our opinion, mere payment of stamp duty on an instrument will not change or alter the nature of the Agreement. The Agreement will have to be read considering its terms. Reliance is placed on the Judgment in **The Godhra Electricity Co. Ltd.& Anr. Vs. The State of Gujarat & Anr, AIR 1975 SC 32.** The ratio of that judgment is that in a case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible and that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and evidence of the acts done under it, is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument. In our opinion the learned Single Judge has construed the various terms of the agreement and the other material on record and at the prima facie stage has come to the conclusion that the Agreement can be specifically performed. An Appellate Court, more so a Court considering an interim order which involves exercise of discretion normally will not interfere with the finding of fact recorded by the trial Court and the exercise of discretion unless the finding is perverse. Nothing has been brought on record to hold that the findings are perverse. The document on the face of it, cannot be an agreement for security. It can only be construed as an Agreement to sell or a development

agreement. In our opinion in this case,

the finding recorded by the learned Single Judge was a finding eminently possible on the material on record. We are, therefore, clearly of the opinion that the Agreement prima facie is an agreement which can be specifically enforced and consequently the Appellants have made out a prima facie case. The other predicates for grant of an injunction will be answered in the discussion that follows.

14. We then come to the issue of the clarification to the order issued by the learned Single Judge. The crux of the issue is, whether after having come to the conclusion that the Agreement could be specifically enforced, the learned single Judge could have in so far as FSI/TDR clarified the earlier part of the order. It is no doubt true that the clause in the Agreement provides that the Appellants will purchase from the owners the right to F.S.I. in respect of an area of 2,00,000 sq.ft. area to be used and utilised by construction of the buildings free from all encumbrances and as available on the property being part of Plot No.C-2 shown shaded in green colour on plan "B" by use of the FSI available in respect of Plot No.C-2 and potentiality of benefit of TDR by whatever name called as generated or to be generated and created by owners from and out of other portion of the entire property being subject to

reservations of D.P. Road, P.G., etc., and/or to be acquired by purchase of Slum TDR, by the owners at their costs from the open market, free from all encumbrances claims and demands at or for the consideration of Rs.500/- per sq.ft. (Built up area). From this, what emerges is firstly that the FSI available from the suit land on which the buildings are being put up can be used and balance to be supplied from the remaining property or to be supplied by purchase of Slum TDR. The expression TDR, is 'Transfer of Development Right'. This enables the FSI to be used on any other plot of land which is generated from some other plot and can be used in terms of the D.C. Regulation in force.

15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the Appellants in so far as the additional F.S.I.is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under Section 3(26) has been defined as under:-

> (26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

If, therefore,any benefit arises out of the land, then it is immovable property. Considering Section 10 of the Specific Relief Act, such a benefit can be

specifically enforced unless the respondents establish that compensation in money would be an adequate relief.

. Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue We may refer to some judgments for that purpose. In **Sikandar & Ors. vs. Bahadur & Ors., XXVII Indian Law Reporter, 462, a Division Bench of the Allahabad** High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the **Oudh High Court in Ram Jiawan and Anr. vs. Hanuman Prasad and Ors., AIR 1940 Oudh 409** also held, that bazar dues, constitute a benefit arising out of the land and therefore a lease of bazar dues is a lease of immovable property. A similar view has been taken by another Division Bench of the Allahabad High Court in Smt. Dropadi Devi vs. Ram Das and Ors., AIR 1974 Allahabad 473 on a consideration of Section 3(26) of General Clauses Act. From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it

is established that compensation in money would be an adequate relief.

16. In the instant case as we have noted, FSI from the Plot is to be used, but if it is not sufficient, then from the other portion of the entire property. The question is whether the latter part of clause 2(a). of the Agreement which provides "and/or to be acquired and purchased Slum TDR by the Owners at their costs from open market" would have the effect of denying to the appellants, injunction as prayed for. When the Court grants a relief it must be in a position to enforce the same. In so far as identifiable land is concerned, it is always possible for the Court to enforce the relief. If the respondents contention is considered, then the relief would not be by way of enforcing the right on the land, but calling on the respondents by way of mandatory injunction to buy slum TDR, whether at the relevant time the respondents are in a financial position to purchase slum TDR or whether Slum TDR would be available or whether a person holding slum TDR is agreeable to sell the same to Respondent Nos. 1 to 10. The escalating cost of TDR would be another factor. In our opinion, the Appellant in the first instance have a right to use F.S.I. of the property and the S.F.I. by whatever name of the reservations of D.P. Road and/or P.G. of the entire property to the extent of 2,00,000 sq.ft. in terms of the agreements. To that extent the learned single Judge

clearly erred in law in clarifying the order. Specific performance can be granted of the land or interest in the land, belonging to a person who has agreed to sell the land with interest therein. If the person is not the owner or has no interest in the land agreed to be sold or transferred there is no question of granting specific performance. Slum TDR is not interest on the owners property. It is F.S.I. of some other land which is transferable in terms of D.C. Regulations. TDR may be owned by the holder but not the land from which TDR was generated. It can only be used on the owners property in terms of D.C. Regulation. Therefore, it is the F.S.I. of the entire property, including of R.G.and D.P. Road, which alone in terms of the Agreement, prima facie which can be specifically enforced. In such circumstances irreparable loss and injury would be occasioned to the Appellants, if the injunction is not granted. The balance of convenience is in their favour as compensation in money in such cases, would not be adequate. To that extent, we are clearly of the opinion, that the clarification given in para.46 of the impugned order is liable to be set aside and we accordingly do so.

17. That leaves us with the second contention, as to whether the Appellants are entitled to right of way as claimed in the Agreement and in the suit. In the instant case this is not an easement of necessity nor an easement by prescription. The only term of

the contract was to provide an access. The plot has

been sub-divided and the sub-division sanctioned by the Planning Authority. The Appellants are entitled to develop a part of the plot C-2 in terms of the Agreement. Plot No.C-2 has an independent access in terms of the sanctioned sub division. Even in a case of easement of prescription or necessity, the owner can always on the facts of a case alter the access on the same land as long as it is provided on the same property and is easily accessible and does not have any impediments. In our opinion the learned Single Judge prima facie, on the facts, was right in not granting the injunction . We are clearly of the opinion that the Appellants have failed to make out a case irreparable loss or injury at the interim stage,

in so far as access is concerned.

18. In the light of what we have set out above,

we pass the following order:-

(i) Appeal is partly allowed to the extent that

we set aside para.46 of the impugned order of the

learned Single Judge.

(ii) The Cross Objections are rejected.

(iii) In the circumstances of the case each party

to bear their own costs.

(**F.I. REBELLO, J)**

(**MRS.V.K.TAHILRAMANI, J).**